



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Ferguson-Williams, Inc.

**File:** B-231827

**Date:** October 12, 1988

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### **DIGEST**

1. Notwithstanding greater importance of other factors in overall evaluation scheme, agency may make award to lower-cost offeror where record establishes that contracting officer had determined proposals to be technically equal and that he had previously advised offerors at the preproposal conference (subsequently confirmed in writing to all offerors) that the agency would use cost as a tiebreaker in the event proposals were rated technically equal.
2. Use of color adjective rating scheme in lieu of using point scores is not improper since even point scores are used only as guides for award selection.
3. Where selection official, after evaluation of proposals on a basis consistent with the solicitation's stated scheme, reasonably regards technical proposals as essentially equal and perceives no cost advantage in either proposal, base and award fees may become the determinative selection factor for award of a cost-plus-award-fee contract where this is consistent with stated evaluation factors.

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### **DECISION**

Ferguson-Williams, Inc., protests the award of a contract to R & D Maintenance Services, Inc. under request for proposals (RFP) No. DACW21-88-R-0266, issued by the Army Corps of Engineers, Savannah District. The protester contends that the agency employed a flawed evaluation methodology, inconsistent with the terms of the RFP, in selecting the successful offeror.

We deny the protest.

On January 29, 1988, the agency issued the RFP for maintenance and repair services, including minor construction, at the J. Strom Thurmond Dam and Reservoir, formerly known as Clarks Hill Lake, Clarks Hill, Georgia and South

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Carolina, for a period of 1 year plus two 1-year options. The RFP contemplated the award of a cost-plus-award-fee contract, based on an integrated assessment of the overall merit of each proposal. The RFP provided that the government would award a contract to the responsible offeror whose offer conforming to the solicitation was most advantageous to the government, cost or price and other factors considered.<sup>1/</sup> The solicitation provided for the evaluation of proposals by scoring every element of the solicitation's scope of work, which included 14 technical provisions, using the following criteria: management, soundness of approach and past performance.<sup>2/</sup> Management and soundness of approach were stated to be of equal importance and of more importance than past performance. The RFP further provided that the total estimated cost (estimated cost plus base and award fees) would be reviewed for completeness, reasonableness and realism and considered independently from technical factors.

On February 18, 1988, the agency held a preproposal conference to discuss unusual aspects of the RFP and give potential offerors a chance to tour the site. The contracting officer was present to discuss the solicitation's requirements and to answer questions about the solicitation. After answering several questions from attendees, the contracting officer briefed the potential offerors on the agency's method for integrating technical and cost evaluations. He explained that the technical evaluation team would assign adjectival descriptions to each proposal and provide a recommendation addressing the team's risk assessment of each rating element. Furthermore, he advised that if technical proposals were rated equally, the cost

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<sup>1/</sup> The protester asserts erroneously that the agency omitted this standard Federal Acquisition Regulation (FAR) clause (FAR § 52.215-16 (FAC 84-17)) that allows the agency to consider cost or price in determining the most advantageous offer, and argues that this alleged omission precludes the agency's consideration of cost or price as a significant evaluation factor.

<sup>2/</sup> The technical provisions (TPs) included, inter alia: TP-3, Cleaning Services; TP-4, Park Caretaker and Park Attendant Services; TP-5, Maintain Buildings, Structures, Mechanical, Electrical, Water Supply, and Sewage Disposal Systems; TP-11, Maintenance and Repair of Walkways, Roads and Parking Areas; TP-13, Boundary Line Maintenance; and TP-14, Renovation and Construction of Impact Sites and Shoreline Stabilization.

proposals seemed realistic and reasonable, and the level of risk seemed acceptable, he would use cost as a tiebreaker. A record of the preproposal conference was furnished to all offerors in a writing signed by the contracting officer.

The agency received four proposals on April 6, 1988; after technical and cost evaluation, the agency selected three proposals for inclusion in the competitive range. On May 24, offerors submitted best and final offers. Proposals received a rating of blue/exceptional (10 points), green/acceptable (6 points), yellow/marginal (2 points), or red/unacceptable (0 points) for each of the three evaluation criteria in each of the 14 technical provisions. For management, the protester received 10 blues and 4 greens; the proposed awardee received 9 blues and 5 greens. Under soundness of approach, the protester and the proposed awardee received the same overall score--5 blues and 9 greens. Both offerors received 12 blues and 2 greens for past performance, with the protester's higher rating under two work elements offset by the proposed awardee's higher rating for two other work elements. The contracting officer averaged the point scores for each criterion and expressed these as color adjectival ratings; he rated both proposals blue for management and past performance and green for soundness of approach.<sup>3/</sup> He concluded that both proposals were exceptional but essentially equal in technical merit.

The protester proposed costs of \$6,045,557 plus a base fee of \$120,911, and an award fee of \$362,734; R & D proposed costs of \$5,964,563, plus a base fee of \$149,114 and an award fee of \$298,228. Cost evaluators concluded that the protester's depreciation rates were overstated by \$54,244, and reduced the protester's estimated cost to \$5,991,313. Despite making this adjustment, the agency was unable to find that in a cost reimbursement environment, either offeror was likely to perform at lower cost; the two proposals were for all practical purposes equal in estimated cost. The contracting officer also determined that based on their past performance of contracts both the protester and the awardee would be likely to earn 100 percent of their

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<sup>3/</sup> The protester's average scores were 8.86 for management, 9.43 for past performance, and 7.43 for soundness of approach. R & D, the proposed awardee, averaged 8.57, 9.43, and 7.43. Since the agency had established 8-10 points as "blue" and 4-8 as "green," both offerors received two blue/exceptional ratings and one green/acceptable rating. The weighted composite scores were 8.40 for Ferguson-Williams and 8.29 for R & D.

award fee. Consequently, according to the contracting officer, the protester would "probably cost" the government slightly more than would the proposed awardee--a base plus award fee of \$483,645, about \$36,000 more than the awardee's proposed base plus award fee of \$447,342. The contracting officer therefore selected R & D for award, using its lower proposed fees as the "tiebreaker." This protest followed on June 27, 1988.

Ferguson-Williams first contends that the agency's proposed selection is inconsistent with the evaluation criteria, which emphasize technical factors. The protester argues that the broad color adjectival scoring scheme creates artificial equality and that by use of this scheme, the agency made the proposed awardee's allegedly inferior proposal appear equal to the protester's proposal, which the protester alleges was decidedly superior, and allowed the agency to make cost the critical evaluation factor in contravention of the terms of the RFP. The protester states that prior to using the color adjectival scoring scheme, the agency was required to issue a formal amendment.

The protester admits that the Corps informed offerors at the preproposal conference that the adjectival descriptions would be used in evaluating each proposal for each rating element and that cost would be used as a "tiebreaker" if the technical proposals were rated essentially technically equal. Since the record of the questions and answers at the preproposal conference was furnished to all offerors in writing signed by the contracting officer, this writing meets the essential requirements for an amendment, and the information therein was therefore binding on all offerors. See Ingersoll-Rand, B-225996, May 5, 1987, 87-1 CPD ¶ 474. We therefore find that the evaluation, using adjectival ratings, was consistent with the terms of the RFP, as amended by the preproposal conference minutes furnished to all offerors. Moreover, contrary to the assertions of the protester, the solicitation did contain FAR § 52.215-16, clause L.13 of the RFP, stating that cost would be considered; indeed, we have held that an offeror may not presume that price will receive no consideration in the award selection, even where it has been omitted as an evaluation factor. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

Concerning the protester's contention that the color adjectival rating scheme produced an artificial equality in the ratings of technical proposals, we first note that even numerical point scores, when used for proposal evaluation, are useful only as guides to intelligent decision-making, and are not generally controlling for award because they

often reflect the disparate, subjective judgments of the evaluators. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. Our Office has in the past examined rating schemes other than strict mathematical scoring and has recognized their validity. See MAXIMUS, B-195806, Apr. 15, 1981, 81-1 CPD ¶ 285; Wickman Spacecraft & Propulsion Co., B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690.

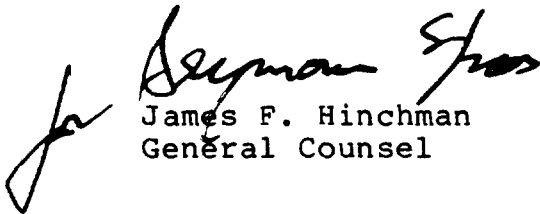
Our review of the record shows nothing to support an inference that use of the color adjectival rating scheme prevented the contracting officer from gaining a clear understanding of the relative merits of proposals. There were technical differences noted, some by narrative; the protester and the proposed awardee received 28 higher ratings than the third offeror and, in 6 of the 14 technical provisions, either the protester or the proposed awardee was rated higher than the other. For one work element in fact, the protester received a higher rating for soundness of approach but the proposed awardee received a higher rating for past performance. We find no evidence that the use of the adjectival system created an artificial equality or prevented the agency from discriminating between the technical proposals. We see no evidence that the protester was affected, let alone prejudiced, by its use. Of forty-two color adjectival ratings codes assigned, the protester's advantage was negligible--27 blue/exceptional against 26 for the awardee. We therefore cannot find that the agency was unreasonable in determining that the two proposals were technically equal; this determination is not proven unreasonable by the protester's good faith belief that its proposal should have received a higher rating. M. Rosenblatt & Sons, B-230026, B-230026.3, Apr. 26, 1988, 88-1 CPD ¶ 409. In these circumstances, since the record shows that the two offerors were found technically equal and that this finding had a rational basis, we have no reason to question the agency's determination to make award on the basis of cost.

Regarding the use of the proposed fee as an award discriminator, we note that its use was consistent with the solicitation's evaluation criteria, which expressly stated that the agency would consider base and award fees. Further, since both offerors were essentially technically equal and also essentially equal in estimated cost, the fixed and award fee amount was the remaining discriminator available to the contracting officer. In this regard, the protester argues that the agency is effectively penalizing it for the good performance that has in the past earned it its full award fee. In the instant case, however, where the protester and the proposed awardee shared a superior record of past contract performance (both consistently earning

100 percent of their award fees), we cannot conclude that the agency's consideration of the difference in proposed award fees was unreasonable.

Finally, the protester also objects to the agency's cost evaluation. The protester argues that the agency made adjustments to its proposed cost and that if consistent adjustments had been made to the proposed awardee's cost, to account for material and equipment omitted from its cost data, the protester's proposed cost would have been lower. The protester provides no support for this contention, and the record does not support it.<sup>4/</sup> Furthermore, the agency adjusted the protester's proposed cost downward because its depreciation rate was too rapid, an action that benefited rather than prejudiced the protester in terms of the cost evaluation. The final offers of the protester and the proposed awardee both had weak areas in cost reasonableness; the agency was for that reason unable to conclude precisely whether that either proposal offered a cost advantage. We have recognized that the analysis of cost proposals entails the exercise of informed judgment; the extent to which proposed costs are examined is a matter of agency discretion. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. Based upon the record before us, we have no basis for concluding that the agency was unreasonable in deciding to treat cost proposals as equal.

The protest is denied.

  
James F. Hinchman  
General Counsel

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<sup>4/</sup> The amount in question, slightly more than \$25,000, was less than the \$26,753 difference between the protester's adjusted estimated costs and the awardee's estimated cost.